LIBRARY
SUPREME COURT, U. S.

FILED
8 5 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 762

UNITED STATES OF AMERICA,
Petitioner,

versus

TOMMY HIETT,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

LEE A. CHAGRA
Counsel for Respondent
Suite 1200
Southwest Nat'l Bank Bldg.
El Paso, Texas 79901
Mari W. Privette
Of Counsel
1024 First National Tower
Las Cruces, New Mexico 88001

INDEX

Page

Argument 1-5

I. Reasons for Denying the Writ

A. The appellate court decision follows settled principles of constitutional law 2-4

B. The case does not merit certiorari 4-5

Conclusion 5

CITATIONS

Cases:

Chaplinsky v. New Hampshire, 315 U.S. 568 3

Connally v. General Const. Co., 269 U.S. 385 4

Lamont v. Postmaster General, 381 U.S. 301 2

Rice v. Sioux City Cemetery, 349 U.S. 70 5

Valentine v. Chrestensen, 316 U.S. 52 3

Statutes:

18 U.S.C. 1714 2

Miscellaneous:

Opinion of the United States Court of Appeals for the Fifth Circuit from Appendix A of Petitioner's Brief, cited as App.A 1-2

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 762

UNITED STATES OF AMERICA,
Petitioner,

versus

TOMMY HIETT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

ARGUMENT

Accepting Opinions Below; Jurisdiction; Statutes Involved; and Questions Presented, Respondent has no statement of correction and therefore under Supreme Court Rule 40, presents only the Argument showing why the cause should not be reviewed by this Court.

I. REASONS FOR DENYING THE WRIT

At the outset Respondent wishes to stress the soundness of the opinion rendered by the Fifth Circuit Court of Appeals. (App.A, pp. 6-25 of Petitioner's Brief here-

inafter cited simply as App.A) Said opinion meticulously traces the history and present status of the postal power of Congress and the relationship of that power to the first amendment. While calling particular attention to the appellate court opinion, Respondent recognizes that this Court is primarily concerned with whether the case is one in which "there are special and important reasons" for granting the writ of certiorari, as required by Supreme Court Rule 19, and urges those reasons are not present here.

A. The Appellate Court Decision Follows Settled Principles of Constitutional Law.

First finding that Respondent's actual conduct is largely irrelevant because, inter alia, 18 U.S.C. 1714 sets no standards of conduct but indiscriminately prohibits the mailing of certain types of communication without regard to fraudulent intent (App.A, p. 8), the appellate court opinion next considers the postal power. The cases carefully outlined therein show the growth and burial of the privilege doctrine, which this Court surely does not wish to disinter, and then demonstrate that today's permissible use of the postal power is to be tested against the first amendment. This was considered most lately in *Lamont v. Postmaster General*, 1965, 381 U.S. 301.

In accord with the many cases it cited, the Court of Appeals summarized that a statute affecting expression, even if enacted under the postal power, is constitutional only if either (1) it meets the twin tests

of specificity and narrowness or (2) the expression it affects is not protected speech. (App.A, p. 15) As to the latter, the Court aptly remarks that in this one prosecution under the 1939 act, the government contends that an undiscovered lode of unprotected expression has awaited finding in this case. Rejecting that contention in light of the test of unprotected speech as enunciated in *Chaplinsky v. New Hampshire*, 1942, 315 U.S. 568, the opinion cites a number of cases showing that "solicitation" does involve protected speech. (App.A, pp. 16, 17) Next, this criminal statute, which affects protected expression, is found wanting when the classic tests are applied to it. (App.A, pp. 17-21) Nor does the encroachment on speech balanced against the public interest justify the vagueness and pervasiveness of section 1714, although a specific narrow statute aimed at preventing fraud would be constitutional. (App.A, pp. 21-25)

As against the appellate court's scholarly array of cases tracing the development of the postal power and the first amendment cases. Petitioner offers only two in defense of the statute and in support of its reasons for granting the writ of certiorari.

The first of the cases refered to above is *Valentine v. Chrestensen*, 1942, 316 U.S. 52. This case did not concern the postal power but rather a New York ordinance restricting distribution in the city's streets of commercial advertising. This Court held that the stipulated facts justified the conclusion that the affixing of a protest to an advertising circular was with the intent and for the purpose of evading the prohibition of the

ordinance. The case at bar is not answered by *Valentine*, supra, nor is "solicitation" so easily defined as Petitioner urges. Rather, as pointed out by the appellate court, the statute raises many problems, one of which being that it reads so broadly, it would interfere with lawyers attempting to advise clients of their legal rights.

The other case cited by Petitioner is *Connally v. General Const. Co.*, 1925, 269 U.S. 385. In the *Connally* opinion, a statute was held fatally vague, inter alia, because the word "locality" was one without a fixed meaning in itself, or made definite by statutory or judicial definition, or the context, but rather was dependent upon the probably varying impressions of juries. In the instant case "solicitation" was applied by the government to mean the *response* to inquiries which illustrates that this is but one of many interpretations of that word, and not even the dictionary meaning.

Respondent submits that the ruling of the Court of Appeals is based so soundly upon prevailing enunciated principles of constitutional law that this Court need not consider it again.

B. The Case Does Not Merit Certiorari

Since Respondent is the only person ever prosecuted under an act passed in 1939, this case is certainly not one in which "there are special and important reasons" for granting the writ of certiorari as required by Supreme Court Rule 19.

In *Rice v. Sioux City Cemetery*, 1954, 349 U.S. 70, this Court noted that "special and important reasons" means a problem beyond the "episodic." When there has been one prosecution in thirty-one years, the problem does not rise to the level of episodic.

A further reason, in the tenor of the *Rice* opinion, is that the view of the postal power as balanced against the first amendment privilege has changed since the time Congress passed this now outmoded act.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted.

Lee A. Chagra
Counsel for Respondent

Mari W. Privette
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be mailed true and correct copies of the foregoing Answer to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, to The Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530.

LEE A. CHAGRA